In The

SUPREME COURT of the UNITED STATES

October Term, 1974

No. 74-70

LOUIS H. GOLDFARB and
RUTH S. GOLDFARB,

Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX
COUNTY BAR ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS, FOURTH CIRCUIT

BRIEF AND APPENDIX OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

For the State Bar of Wisconsin

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Letters from attorneys for all parties consenting to the filing of this brief are on file with the clerk.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, is reported in 497 Fed. (2) 1.

QUESTION PRESENTED

Does the Sherman Anti-Trust Act apply to an integrated State Bar fee schedule or to the fee schedules of voluntary bar associations?

INTEREST OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

The State Bar of Wisconsin like the Virginia State Bar is an integrated bar although created by state action pursuant to order of the Supreme Court of Wisconsin acting under its inherent power rather than by legislative act as in Virginia. See *Lathrop v. Donahue* (1961) 367 U. S. 820, for the history and structure of the State Bar of Wisconsin, and its validity.

Unlike the Virginia State Bar the State Bar of Wisconsin does not now have and does not propose to adopt any fee schedule either compulsory or voluntary relating to the general practice of law. However, the State Bar of Wisconsin is very deeply concerned with the adverse effect of a possible reversal of the decision of the United States Court of Appeals for the Fourth Circuit in that a holding to the effect that a State Bar is subject to the price fixing provisions of the Sherman Anti-trust Act would seriously jeopardize the efforts of the State of Wisconsin in discharging the duty of the profession to deliver adequate legal services to the public at reasonable rates through the medium of Group and Prepaid Legal Service plans providing a schedule of benefits and fees.

While the State Bar of Wisconsin has no immediate interest in that part of the decision below relating to fee schedules of voluntary bar associations such as the Fairfax County Bar Association here, it does strongly subscribe to the holding of the lower court that the practice of a learned profession such as the law is neither trade or commenrce and that restraints upon such practice are not per se violative of the Sherman Act. However, this

brief will not be addressed to that subject but will be confined to that part of the decision relating to State Bar fee schedules and how the reversal of the lower court decision will destroy the professional duty of the bar to provide services to the public at reasonable rates through Group and Prepaid Legal Service plans such as are contemplated by the State Bar of Wisconsin pursuant to rules of the Supreme Court of Wisconsin promulgated on November 29, 1972, effective December 7, 1972, published in 55 Wis. (2) xi-xiii, a copy of which is set forth in this brief as Appendix A, and as implemented by Minimum Standards for Group and Prepaid Legal Service Plans adopted by the Board of Governors of the State Bar of Wisconsin on September 21, 1973, a copy of said standards being attached to this brief as Appendix B.

SUMMARY OF ARGUMENT

The State Bar of Wisconsin takes the position that the judgment of the United States Court of Appeals, Fourth Circuit, should be affirmed because:

1. There is nothing in the Sherman Act which requires it to be so interpreted as to deprive the public of the right to receive legal services under a state plan promoting the delivery of legal services at the lowest possible cost in accordanc with pre-arranged schedules of benefits and costs.

2. The United States Supreme Court has indicated its approval of attorney fee fixing for legal services at reasonable rates to organized public interest groups.

3. The public as well as the legal profession has the right to know the customary fee charged for legal services.

ARGUMENT

I.

THERE IS NOTHING IN THE SHERMAN ACT WHICH REQUIRES IT TO BE INTERPRETED IN SUCH A WAY AS TO DEPRIVE THE PUBLIC OF THE RIGHT TO RECEIVE LEGAL SERVICES UNDER ANY STATE PLAN WHICH WILL PERMIT THE LEGAL PROFESSION TO DELIVER SUCH SERVICES AT THE LOWEST POSSIBLE COST IN ACCORDANCE WITH PREARRANGED SCHEDULES OF BENEFITS AND COSTS

As indicated above the interest of the State Bar of Wisconsin in this appeal arises out of its concern that if the decision of the Fourth Circuit is reversed and the Sherman Act is held to be applicable to the fee schedules of an integrated bar the result could place in grave jeopardy any program promoted by the profession and the courts such as Group or Prepaid Legal Service plans providing a schedule of prearranged benefits and fees.

That such a fear is not an idle one is amply demonstrated by the fact that representatives of the Anti-Trust Division of the United States Department of Justice have publicly announced not just once but a number of times their determination of prosecuting bar associations whose Group and Prepaid Legal Service plans do not meet with their approval in one way or another.

It is unnecessary o into the details here but the controversy is set fort. .t some length in articles in the American Bar Association Journal, such as the following:

1. "Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee", July, 1974, Vol. 60, p. 791 and ff.

2. "Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Anti-Trust Problems", November, 1974, Vol. 60, p. 1410 and ff.

3. "The Prepaid Legal Service Picture", December, 1974, Vol. 60, p. 1545.

Also as appears in the November, 1974, issue of the American Bar Association Journal at page 1411, the Justice Department has filed a number of suits against various professional organizations including a challenge to the use of minimum and suggested fee schedules by the Oregon State Bar.

The Justice Department has proposed to draw distinctions betwen so-called "open" and "closed" plans of delivery of legal services to the public. Who knows what distinctions they may attempt to enforce upon the legal profession tomorrow?

The inherent power and responsibility for the regulation of the practice of law belongs to the judicial rather than to the legislative department of government.

In re Cannon (1932) 206 Wis. 374, 240 NW 441

Integration of Bar Cases

(1943) 244 Wis. 8, 11 NW (2) 604

(1946) 249 Wis. 523, 25 NW (2) 500

(1956) 273 Wis. 281, 77 NW (2) 604

(1958) 5 Wis. (2) 618, 93 NW (2) 601

Lathrop v. Donahue (1960) 10 Wis. (2) 230, 102 NW (2) 404, affirmed 367 U. S. 820

State ex rel. Reynolds v. Dinger (1961) 14 Wis. (2) 193, 109 NW (2) 685

State ex rel. State Bar v. Keller (1961) 16 Wis. (2) 377, 114 NW (2) 685, 21 Wis. (2) 100, 123 NW (2) 905, cert. denied 377 U. S. 964

State ex rel. State Bar v. Bonded Collectors (1967) 36 Wis. 2) 643, 154 NW (2) 250, 27 ALR (3) 1138

State ex rel. Baker v. County Court (1965) 29 Wis. (2) 1, 138 NW (2) 162, 19 ALR (3) 1089

This is a point that cannot be stressed too strongly. It is true as was said in the case of *In re Greathouse* (1933) 189 Minn. 51, 248 NW 735, 737, that the judicial power of the courts has its origin in the constitution, but when a court comes into existence, it comes with inherent powers.

The three great departments of government being made separate and independent of one another precludes the idea that the legislative department may embarrass the judiciary by regulating the practice of law and such an intent should not be inferred in the absence of express constitutional provision.

In re Cannon (1932) 206 Wis. 374, 397, 240 NW 441

As was said in this case at page 379:

"We do not fail to appreciate the delicacy in considering a disputed question involving legislative and

judicial power. We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

A reversal of the decsion of the Fourth Circuit here so as to place the subject of fees for the professional services of lawyers under the aegis of the Anti-Trust Division of the Justice Department is the invitation to the dance so far as surrender of the regulation of law to a vast federal bureaucracy is concerned.

As the lower court so ably pointed out in quoting at page 19 from *Unted States v. Cooper Corporation* (1941) 312 U. S. 600, 606, it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation, and that in effect the Goldfarbs are urging the court to indulge in judicial legislation.

II.

THE UNITED STATES SUPREME COURT HAS IMPLIEDLY GIVEN ITS APPROVAL TO ATTORNEY FEE FIXING

While the case of *United Transportation Union v. State Bar of Michigan* (1971) 401 U. S. 576 was not an anti-trust case, it is nevertheless very significant from the standpoint of its implications here.

The Michigan State Bar sought to enjoin the members of a railroad union from solicitation of personal injury litigation in cases where attorneys had agreed on maximum 25% attorney fees. The stated purpose of the union was to assist their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.

The question of the propriety of a fixed reasonable attorney's fee appears to have carried considerable weight as is evidenced by the following language from the majority opinion at page 585:

> ". . . It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel. . . ."

Thus, the principle of an agreement fixing attorney fees was accepted by the court as well as by counsel. It is indeed difficult to believe that the applicability of the Sherman Act to such fee fixing would have been entirely

overlooked by the court and the contesting parties if, in fact, there is any substance to the suggestion that lawyers involved in widespread fee fixing agreements are violating the Sherman Act.

III.

THE PUBLIC AS WELL AS THE LEGAL PROFESSION HAS A RIGHT TO KNOW THE CUSTOMARY FEE CHARGED FOR DELIVERY OF LEGAL SERVICES

Under Canon 2 of the Code of Professional Responsibility, DR 2-106 (B) (3) of the American Bar Association, one of the factors to be considered in determining the reasonableness of a fee is the fee customarily charged in the locality for similar legal services. This Code has been adopted by many state bars and is binding upon the members of the State Bar of Wisconsin by Supreme Court order. [43 Wis. (2) xiii-Lxxvi].

The customary fee standard is not only sanctioned by the Code of Professional Responsibility but it has also found its way into the statute law as in provisions allowing recovery of attorney fees in suits brought under Consumer Acts. For example, in consumer transaction litigation when the customer prevails under Sec. 425.308 (2) (b) Wis. Stats., it is provided that in determining the amount of the fee the court may consider among other things, "The customary charges of the bar for similar services."

How in the world is the public, the courts, and indeed the legal profession to know what the customary charges

of the bar are for similar services in the absence of a fee schedule?

Certainly the Sherman Act on its face is subject to no such construction as is urged by the Goldfarbs, and if by some process of tortured construction it is so interpreted, we then are led to the conclusion as stated in *United Transportation Union*, supra, page 581, that if a statute upon its face abridges rights guaranteed by the First Amendment, it should be struck down.

CONCLUSION

For the reason stated, the judgment of the United States Court of Appeals herein should be affirmed.

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